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KIMBERLY-CLARK WORLDWIDE, INC. Tara Pohlkotte 2300 Winchester Rd. NEENAH, WI 54956			TORRES VELAZQUEZ, NORCA LIZ	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte REBECCA WILLEY GRIFFIN
and JAMES ANTHONY RIGGS

Appeal 2009-005358
Application 10/697,465
Technology Center 1700

Before CHARLES F. WARREN, TERRY J. OWENS, and
CATHERINE Q. TIMM, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Applicants appeal to the Board from the decision of the Primary Examiner finally rejecting claims 11-22 in the Office Action mailed November 30, 2006. 35 U.S.C. §§ 6 and 134(a) (2002); 37 C.F.R.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

§ 41.31(a) (2007).

We affirm the decision of the Primary Examiner.

Claim 11 illustrates Appellants' invention of a cross machine direction extensible nonwoven web, and is representative of the claims on appeal:

11. A cross machine direction extensible nonwoven web consisting essentially of continuous thermoplastic fibers and a plurality of thermal bond points in a pattern, the continuous thermoplastic fibers having an average diameter greater than about 10 microns, the nonwoven web having substantially uniform basis weight, and wherein the force required to extend the bonded nonwoven web 30 percent in the cross machine direction is less than about 60 percent of the cross machine direction peak tensile force of the bonded nonwoven web.

Appellants request review of the ground of rejection under 35 U.S.C. § 102(b) or, in the alternative, under 35 U.S.C. § 103(a) advanced on appeal by the Examiner: claims 11-22 over Abuto (US 5,804,021).² App. 3;³ Ans. 3.

Appellants argue the claims in the ground of rejection as a group. Br. 3-6. Thus, we decide this appeal based on claim 11. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

Opinion

We cannot agree with Appellants' position that the Examiner erred in applying Abuto to claim 11 because of the claim limitation "[a] cross machine direction extensible nonwoven web consisting essentially of

² The Examiner cites Schmidt (US 2004/0121110 A1), Cartwright (US 2005/0079987 A1), and Adanur (Sabit Adanur, *Wellington Sears Handbook of Industrial Textiles* 563 (Technomic Publishing Co. 1995)) to show known physical properties and dimension conversions. Ans. 3. Appellants do not dispute this use of the references.

³ We considered the Appeal Brief filed July 2, 2007.

continuous thermoplastic fibers.” Br. 4-5. According to Appellants, Abuto would have “provide[d] for the extensibility to be increased because the webs contain a plurality of slits through the nonwoven material” of the nonwoven web facing layer made from continuous fibers, resulting in “at least a substantial number of discontinuous fibers at the slits.” Br. 4 (original emphasis deleted). Appellants argue that the slits/cuts in Abuto’s nonwoven facing layer is a post-processing structural change which excludes the layer from claim 11 by reason of the transitional term “consisting essentially of.” Br. 4-5. “[T]he inventive material consisting essentially of continuous fibers does not include within the scope such a material having a plurality of slits, because this would mean a fibrous nonwoven web having many discontinuous fibers at the positions of the slits across the nonwoven web.” Br. 4; *see also* Br. 5.

Appellants thus do not dispute that, as the Examiner finds, Abuto teaches that the nonwoven web facing layer is formed from continuous fibers that are thermally point bonded in a pattern with discontinuous slits then formed in the web to provide extensibility in the cross machine direction. Ans. 3-5, citing Abuto abstract, col. 7, ll. 25-44, col. 9, ll. 30-33, col. 11, l. 64 to col. 12, l. 56, and Figs. 1 and 2. *See also* Abuto, e.g., col. 3, ll. 53-64, and col. 7, l. 45 to col. 9, l. 47.

The Examiner submits that Appellants have the burden of showing that Abuto’s slits will materially change the characteristics of the claimed nonwoven web and thus are excluded by the transitional term “consisting essentially of.” Ans. 5-6. The Examiner maintains that Abuto’s slits would not materially change the characteristics of the claimed invention because

Abuto teaches continuous fibers and claim 11 “does not define the length of the claimed continuous fibers.” Ans. 6. The Examiner further argues that Abuto’s slits are in the machine direction of the nonwoven web, “parallel to the direction of the spunbonded filaments, therefore, the presence of such slits will not affect the strength of the material in that direction and accordingly, there will be no significant discontinuity in the fibers running in that direction.” Ans. 6. Thus, “there is no material difference in the structure claimed in the present invention and the material taught by” Abuto.” Ans. 6

We agree with the Examiner that Appellants have the burden to establish that Abuto’s slits in the nonwoven web facing layer formed from continuous fibers would materially affect the basic and novel characteristics of the claimed cross machine direction extensible nonwoven web consisting essentially of continuous fibers. Appellants’ arguments do not establish that the written description in the Specification describes additional structures or modifications in the disclosed cross machine direction extensible nonwoven web which would materially affect the basic and novel characteristics thereof. *See generally* Briefs. *See, e.g., In re Herz*, 537 F.2d 549, 551-52 (CCPA 1976) (“[I]t is necessary and proper to determine whether [the] specification reasonably supports a construction” that would exclude or include particular ingredients.); *In re De Lajarte*, 337 F.2d 870, 873-74 (CCPA 1964); *see also PPG Indus., Inc. v. Guardian Indus. Corp.*, 156 F.3d 1351, 1354-57 (Fed. Cir. 1998).

Indeed, we find in the Specification a definition of the term “fibers” as referring to, among other things, “substantially continuous filaments,” and

that the term “‘substantially continuous’ with respect to a filament or fiber means a filament or fiber having a length much greater than its diameter, for example having a length to diameter ratio in excess of about 15,000 to 1, and desirably in excess of 50,000 to 1.” Spec. 5:5-9; *see* Br. 2, Summary of Claimed Subject Matter. We find that the term “substantially continuous” as defined does not provide a specific range for the length of the substantially continuous fiber, and it is apparent that such fibers can be of different lengths and result in the claimed nonwoven web. While claim 1 includes the limitation that the continuous fibers have an average diameter greater than about 10 microns, there is no basis in claim 1 or in the Specification identified by Appellants on which to determine the length of a claimed “continuous fiber” from a diameter range.

Thus, on this record, we further agree with the Examiner that Appellants have not carried the burden of establishing that Abuto’s slits in a nonwoven web formed from continuous fibers and having a plurality of thermal bond points in a pattern would be excluded from claim 11 by the transitional term “consisting essentially of.” Indeed, there is no basis in the Specification on which to determine whether Abuto’s slits will result in fibers that are not “continuous” as claimed. In this respect, the Examiner finds that Abuto’s slits are parallel to the direction of the spunbonded fibers and thus, would result in no significant discontinuity to the fibers when the slits are formed.

Accordingly, based on our consideration of the totality of the record before us, we have weighed the evidence of anticipation and of obviousness found in Abuto with Appellants’ countervailing evidence of and argument

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for non-anticipation and nonobviousness and conclude, by a preponderance of the evidence and weight of argument, that the claimed invention encompassed by appealed claims 11-22 would have been anticipated as a matter of fact under 35 U.S.C. § 102(b), and would have been obvious as a matter of law under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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